

Commission on Common Ownership Communities
for Montgomery County, Maryland

In the Matter of
Allen Warshaw, Owner of
15416 Indianola Drive
Complainant

vs.

Case No 114-O
June 25, 1992

Board of Directors
Ray Klaar, President
Derwood Station South Homeowners
Association
Respondent

Decision and Order

The above-entitled case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1984, as amended, and the Commission having considered the testimony and evidence of record, it is therefore, this twenty-fifth day of June, 1992, found, determined and ordered as follows:

On August 16, 1991, Mr. Allen Warshaw, owner of 15416 Indianola Drive, Rockville, Maryland, hereinafter the Complainant, filed a formal dispute with the Office of Common Ownership Communities. The Complainant alleged that the Board of Directors of Derwood Station South Homeowners Association, hereinafter the Respondent, unreasonably denied his request for approval of a six-foot fence across the rear of his property, and that the denial was inconsistent with Article VIII, Sections 9 and 10, of the Community's Declaration. The Complainant also alleged that the Respondent was inconsistent in its approval and disapproval of fences throughout the Community. The Complainant additionally alleged that the Respondent unreasonably denied him approval for the addition of a portico on the front of his home.

The Respondent maintains that its denial of approval for the Complainant's six-foot fence is justified and in compliance with Article VIII, Section 9, of the Community's Declaration and Section II (7) and attachment 1 of the Community's Architectural and Environmental Review Committee Guidelines. The Respondent also maintains that it is consistent in its decisions on approval and disapproval of fences throughout the Community. The Respondent additionally maintains that it was justified in its denial of the Complainant's request for approval for the addition of the front portico, inasmuch as the style chosen by the Complainant was not in conformity with the design concept of the Community.

The Complainant sought an order for the Respondent to approve his plans for the six-foot fence and the front portico as submitted. Each party requested that the other be held responsible for payment of attorney's fees arising from this dispute.

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities for action pursuant to Section 10B-11(e). On February 5, 1992, the Commission voted to hold a public hearing which commenced on April 13, 1991, and concluded on May 11, 1992.

FINDINGS OF FACT

Based on the testimony and evidence of record, the Commission makes the following findings:

1. The Complainant resides at 15416 Indianola Drive, Rockville, Maryland, and the property is a single family home.
2. On April 16, 1990, the Complainant requested approval from the Community's Architectural and Environmental Review Committee (AERC) to build a six-foot fence along the back of his yard between his property and 7306 Grinnel Drive. The Complainant requested an exception to the policy of no fences higher than 4 feet.
3. The AERC denied approval for the Complainant to build the six-foot fence based upon the Community guideline which limits fence heights to four feet except when a fence is being used to surround an in-ground swimming pool.
4. The Complainant appealed the AERC's disapproval of his application to build a six-foot fence.
5. The Respondent Board affirmed the AERC's decision to disapprove the Complainant's application to build a six-foot fence.
6. In making its decision, the Respondent Board considered the relevant portions of the Community's Declaration, which state as follows:

"ARTICLE VIII

Section 9. Fences. Any fence constructed upon the Property shall be either horizontal rustic, unfinished split rail or vertical board and shall not extend beyond the front building line of the dwelling on the lot upon which any such fence is erected or the front building line of the dwellings on all immediately adjacent lots. No fence shall be more than six (6) feet in height. Chain link and other wire fencing is specifically prohibited. The erection of all fences shall be subject to the provisions of Article VIII of this Declaration.

Section 10. House Rules, etc. There shall be no violation of any reasonable rules for the use of the common areas and community facilities or "house rules" or other community rules and regulations not inconsistent with the provisions of this Declaration which may from time to time be adopted by the Board of Directors of the Association and promulgated among the membership by them in writing, and the Board of Directors is hereby and elsewhere in this Declaration authorized to adopt such rules."

7. In making its decision, the Respondent considered the Community's Architectural and Environmental Review Committee guidelines which state as follows:

"SECTION II - EXAMPLE OF CHANGES WHICH REQUIRE APPROVAL

To assist you, here is a partial list of common changes which need AERC approval. If you are considering a change which is not listed in Section I (blanket approval) or Section IV (items prohibited), it should be submitted to the AERC.

. . .

7. Fencing. (See Attachment #1)..."

"ATTACHMENT #1 - FENCING

When considering a fence, you should think about the impact on your neighbors, the view from their home, how it will affect the aesthetics of their property, and how the fence will fit in with the immediate neighborhood. To assist you with these considerations, the following specific guidelines should be followed:

. . . .

2. Fencing must be unpainted treated wood and no higher than four feet. To surround an in-ground swimming pool, a six-foot fence may be requested."

8. The Complainant does not have an in-ground swimming pool and has not stated an intent to install an in-ground swimming pool.
9. Testimony and evidence relating to the following addresses was entered into the record as to whether the Respondent was consistent in approving or disapproving fences:

a. 18 Monona Court - A scalloped fence with a base height of approximately four feet and a high point measurement of approximately four feet six inches high was approved by the Respondent in August, 1989, and viewed as being similar in nature to a split rail fence that has post heights that measure at greater heights than the railings that connect the posts. Since that time, no application for a fence higher than four feet in height has been approved by the Respondent.

b. 5 Grinnel Court - According to testimony offered by Respondent's witness Mr. Day, the owner submitted an application for approval to build a six foot fence and the application was denied on the basis that six foot fences would be approved only when used to surround an in-ground pool. The owner then re-submitted the application and stated an intent to install an in-ground pool. The application was then approved, however the owner did not install an in-ground pool. To guard against a repeat occurrence of this situation, the Respondent amended its policy to require that approval for a six-foot fence would only be granted if an application submission included detailed engineer drawings for an in-ground pool.

c. 7313 Grinnell Drive - The existing structure is not a fence and is therefore not relevant to this dispute.

d. 15532 Indianola Drive - The fence surrounds a swimming pool.

e. 7411 Monona Terrace - The fence surrounds a swimming pool.

f. 15525 Villisca Terrace - This property address is a townhouse. Construction of the structure occurred prior to the existence of the current guidelines relating to fence height.

g. 15521 Villisca Terrace - This property address is a townhouse. Construction of the structure occurred prior to the existence of the current guidelines relating to fence height.

h. 7406 Monona Terrace - This property address is a townhouse. Construction of the structure occurred prior to the existence of the current guidelines relating to fence height.

10. On April 15, 1990, the Complainant requested approval from the AERC for the addition of a portico to the front of his home.
11. On April 24, 1990, the AERC denied the Complainant's application for the portico addition and, based upon the submission, found the design not to be in consonance with the existing neighborhood style. The AERC requested that the Complainant provide additional detail regarding the specifications for the proposed portico.
12. The Complainant appealed the AERC's decision to deny his portico addition, but did not provide the additional detailed specifications requested.
13. The Respondent Board affirmed the AERC's decision to disapprove the Complainant's application for a portico addition.
14. In making its decision, the Respondent Board considered the relevant portions of the Community's Declaration, which state as follows:

ARTICLE VIII

Section 1. Architectural and Environmental Review Committee.

Except for construction or development by, for or under contract with the Declarant, and except for any improvements to any lot or to the common areas accomplished by the Declarant concurrently with said construction and development, and except for purposes of proper maintenance and repair, no building, fence, wall or other improvements or structures shall be commenced, directed, placed, moved, altered or maintained upon the Property, nor shall any exterior addition to or change (including any change of color) or other alteration thereupon be made until the complete plans and specifications showing the location, nature, shape, height, material, color, type of construction and any other proposed form of change (including, without limitation, any other information specified by the Architectural and Environmental Review Committee) shall have been submitted to and approved in writing as to safety, harmony of external design, color and location in relation to surrounding structures and topography and conformity with the design concept for the community by an Architectural and Environmental Review Committee designated by the Board of Directors.

Subject to the same limitations as hereinabove provided for, it shall be prohibited to install, erect, attach, apply, paste, hinge, screw, nail, build, alter, remove or construct any exterior lighting, shades, screens, awnings, patio covers, fences, wall, slabs, sidewalks, curbs, gutters, patios, balconies, porches, driveways, or to make any change or otherwise alter (including any alteration in color) in any manner whatsoever the exterior of any improvements constructed upon any lot or upon any of the common areas, or to combine or otherwise join two or more dwellings, or to partition the same after combination, or to remove or alter any windows or exterior doors of any dwelling, until the

complete plans and specifications, showing the location, nature, shape, height, material color, type of construction and any other proposed form of change (including, without limitation, any other information specified by the Architectural and Environmental Review Committee) shall have been submitted to and approved in writing as to safety, harmony of external design, color and location in relation to surrounding structures and topography and conformity with the design concept for the community by the Architectural and Environmental Review Committee designated by the Board of Directors.

15. On May 7, 1990, the Respondent, when adjourning an open meeting into an executive session to review the Complainant's original appeal of the AERC's denial of the Complainant's application did not adjourn by means of a specific vote and did not state specific reasons for adjournment into executive session.
16. On July 2, 1990, in a subsequent open meeting to reconsider the Complainant's appeal, the Respondent adjourned the meeting to consult with former members of the Board and did take a vote and state specific reasons for adjournment into Executive Session. The meeting was then reconvened in open session and the matter discussed and voted upon.
17. The Complainant participated in the decision making process and helped author the AERC guideline which limits fence height to four feet except when a fence is being used to surround an in-ground swimming pool.

CONCLUSIONS OF LAW

Accordingly, the Commission concludes based upon a preponderance of the evidence, including, but not limited to testimony and documents admitted into evidence, and after a full and fair consideration of the evidence of record, that:

1. Article VIII, Section 9 of the Declaration provides authority for the Respondent to adopt guidelines restricting fence height to less than six feet without amending the governing documents. Only in the event that the Respondent chose to adopt guidelines that would permit fences to be greater than six feet in height would it need to amend the documents.
2. The Respondent acted within its purview in denying the Complainant's application to build a six-foot fence along the back of his yard, which denial is consistent with the Respondent's authority as outlined in Article VIII, Sections 9 and 10 of the Community's Declaration and the AERC guidelines.
3. The Respondent has been consistent in its decisions relative to approval and disapproval of fences throughout the Community.
4. The Respondent acted within its purview in exercising its business judgment in denying the Complainant's application to build a portico on the front of his home, which denial is consistent with the Respondent's authority as outlined in the Community Declaration.

5. The AERC may require information prior to approval of each application it reviews, and the AERC acted within its authority in requesting additional detail from the Complainant with regard to his application for a proposed portico addition.
6. Based upon its determination that the AERC correctly found that the Complainant's application for a portico addition contained inadequate detail, the Respondent Board acted within its authority in finding that the design was not in consonance with the existing neighborhood style and in denying the Complainant's application.
7. Based upon the language contained in Article VIII, Section 1 of the Community Declaration, the Respondent is vested with authority to make architectural decisions in conformity with the design concept and harmony of external design within the Community.
8. The actions of the Respondent Board are to be analyzed under what has been at times called the "Business Judgment Rule", which has recently been cited by the Court of Special Appeals of Maryland in Black, et ux. v. Fox Hills North Community Association, Inc., 90 Md. App. 75, 599 A. 2d 1228 (1992), in which the Court stated:

"This rule requires the presence of fraud or lack of good faith in the conduct of a corporation's internal affairs before the decisions of a board of directors can be questioned....If the corporate directors' conduct is authorized, a showing must be made of fraud, self-dealing or unconscionable conduct to justify judicial review. This presents an issue of law rather than of fact....Although directors of a corporation have a fiduciary relationship to the shareholders, they are not expected to be incapable of error. All that is required is that persons in such positions act reasonably and in good faith in carrying out their duties....Courts will not second-guess the actions of directors unless it appears that they are the result of fraud, dishonesty or incompetence." (citations omitted).
9. The Board had authority under its covenants to undertake the decisions it made and there is no testimony or evidence in the record to support the presence of fraud or lack of good faith in the conduct of the Respondent in this dispute.
10. The Complainant did not comply with the Respondent's request that he submit additional information relating to detailed specifications for the requested portico addition.
11. On July 2, 1990, the Respondent provided an opportunity for the Complainant to present testimony in support of his appeal. This opportunity occurred prior to the Respondent Board's making a decision on the Complainant's appeal of the AERC's decision. Therefore, the Complainant was not harmed by the Board's failure to conduct a vote and state specific reasons for adjournment to executive session on May 7, 1990.
12. Based upon the Complainant's notice through participating in formulating the AERC guideline limiting fence height and his failure to comply with the Respondent's request for additional detail for the proposed portico addition, his filing of this dispute bordered on a filing in other than good faith. However, language from the Court of Special Appeals of Maryland, in Black, et ux. v. Fox Hills North Community Association, Inc., supra., is instructive, and states that the award of attorney's fees should be "an extraordinary remedy, intended to reach only intentional misconduct."

13. The Commission concludes that neither party evidenced a pattern of behavior which would justify the award of attorney's fees in this matter. Therefore, neither the Complainant nor the Respondent have responsibility for the payment of the other party's attorney's fees pursuant to the provisions of Section 10B-13(d) of the Montgomery County Code, 1984, as amended.


ORDER

In view of the foregoing, and based on the evidence of record, the Commission orders the following:

1. That the Respondent's denial of the Complainant's application to build a six-foot fence across the rear of his property is hereby affirmed.
2. That the Respondent's denial of the Complainant's application to build a portico on the front of his home is hereby affirmed.

The foregoing was concurred in by panel members Gardner, Abbott, and Smith.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this Order, pursuant to Chapter 1100, Subtitle B, Maryland Rules of Procedure.


David Gardner
Panel Chairperson
Commission on Common Ownership
Communities